

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

JULIAN DALE KEY

Petitioner,
v.

CASE NO. 5:07-CV-11507
HONORABLE JOHN CORBETT O'MEARA
UNITED STATES DISTRICT JUDGE

SHERRY BURT,

Respondent.

**OPINION AND ORDER GRANTING PETITIONER
AN EXTENSION OF TIME TO FILE AN APPEAL**

On December 6, 2007, this Court issued an opinion and order denying petitioner's application for habeas relief brought pursuant to 28 U.S.C. § 2254. *Key v. Burt*, No. 2007 WL 4303207 (E.D. Mich. December 6, 2007). This Court also denied petitioner a certificate of appealability and leave to appeal *in forma pauperis*. *Id.* On January 14, 2008, petitioner filed a notice of appeal. The same day, petitioner filed a motion for a certificate of appealability, which this Court denied on January 28, 2008. The matter is on remand from the Sixth Circuit for a determination by this Court as to whether petitioner should be granted an extension of time to file his appeal, based on the fact that he had been transferred to another prison, which delayed his receipt of the Court's order of December 6, 2007.

Fed.R.App.P. 4 (a)(1) states that a notice of appeal must be filed within thirty days of the entry of the judgment or order from which the appeal is taken. This time limit is mandatory and jurisdictional. *Browder v. Director, Department of Corrections of Illinois*,

434 U.S. 257, 264 (1978). The failure of an appellant to timely file a notice of appeal deprives an appellate court of jurisdiction. *Rhoden v. Campbell*, 153 F. 3d 773, 774 (6th Cir. 1998).

However, Fed.R.App.P. 4 (a)(5)(A) indicates that a district court may extend the time to file a notice of appeal if:

- (i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and
- (ii) that party shows excusable neglect or good cause.

In the present case, this Court issued an opinion and order denying the petition for writ of habeas corpus on December 6, 2007. Petitioner claims in his cover letter to his motion for a certificate of appealability that he had been transferred from the Southern Michigan Correctional Facility in Jackson, Michigan to the Straits Correctional Facility in Kincheloe, Michigan, which caused him a weeks's delay in receiving this Court's opinion and order denying habeas relief.

In the present case, petitioner is entitled to leave to file a late notice of appeal from the Court's order denying his habeas petition, since petitioner did not receive timely notice of the decision and no party would be prejudiced by allowing a late appeal in this case. *United States ex. rel. Morgan v. Page*, 39 F. Supp. 2d 1103, 1104-1105 (N.D. Ill. 1999).

ORDER

IT IS HEREBY ORDERED that the motion for an extension of time to file an

appeal is **GRANTED**.

s/John Corbett O'Meara
United States District Judge

Date: July 1, 2008

I hereby certify that a copy of the foregoing document was served upon the parties of record on this date, July 1, 2008, by electronic and/or ordinary mail.

s/William Barkholz
Case Manager